Amendment, much less take the extraordinary step of granting review in a case that has not been resolved by the court of appeals.

Granting review before judgment is particularly unwarranted in this case because petitioners *prevailed* on their First Amendment claim in the district court and obtained an injunction preventing the government from enforcing the Solomon Amendment against Yale University. While the Court has granted a petition for review before judgment by a prevailing party in extraordinary circumstances, see *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 686-687 nn.1-2 (1974), petitioner has not identified any remotely comparable extraordinary circumstance here.

2. Petitioners contend that the record in this case is more complete than the record in *FAIR* and therefore provides a more suitable vehicle for review of the constitutional issues. Pet. 4, 21-22. That contention is incorrect. The record in this case is confined to a single school, and the district court held that the Solomon Amendment is unconstitutional only as applied to that school. In contrast, the *FAIR* plaintiffs submitted evidence regarding school recruiting practices and the putative operation of the Solomon Amendment with respect to a number of schools. On the other side of the evidentiary scale, the government's evidentiary presentation in this case is no different from its presentation in *FAIR*. There is therefore no basis for petitioners' contention that this case provides a better vehicle for resolving the constitutionality of the Solomon Amendment than *FAIR*.

Petitioners contend that evidence below on the effectiveness of military recruiting at Yale Law School is vital to determining whether the Solomon Amendment

survives strict scrutiny, because it reflects the military's experience at Yale both before and after Yale afforded equal access to military recruiters. Pet. 21-22. The government's principal submission, however, is that the Solomon Amendment is not subject to strict scrutiny. Even if the Solomon Amendment were subject to strict scrutiny, however, the outcome of that scrutiny does not turn on the effect of the Solomon Amendment on recruiting at a single educational institution. The Solomon Amendment is intended to advance the government's compelling interest in military recruiting at all of the Nation's educational institutions that receive federal financial assistance. Evidence of its impact at a single law school cannot establish that it fails to further that goal.

Petitioners argue that this case is better suited for review than *FAIR* because *FAIR* is at the preliminary injunction stage, while this case contains a "closed" factual record. Pet. 20. But as noted above, the district court in this case entered summary judgment in favor of petitioners without giving the government the opportunity to conduct discovery, and did so over the government's objections. The district court's refusal to permit discovery remains subject to review in the court of appeals, and if the court of appeals concludes that discovery should have been allowed, the record that petitioners characterize as "closed" will be reopened for further development.

Moreover, nothing about the interlocutory posture of *FAIR* renders it unsuitable as a vehicle for addressing the constitutionality of the Solomon Amendment. As noted in the government's petition in *FAIR*, this Court routinely reviews the constitutionality of Acts of Congress in the context of preliminary injunction proceed-

ings. See 04-1152 Pet. at 24 (citing cases). And, as discussed above, *FAIR* presents the crucial legal questions that will determine the constitutionality of the Solomon Amendment. This Court evidently agrees that *FAIR* is a suitable vehicle for it has granted the government's certiorari petition in that case.

There are two additional reasons why the Court should not grant the petition for review before judgment in this case. First, because the Court has already granted certiorari in *FAIR*, the briefing process for that case will be nearly complete before the Court considers the petition in this case in the ordinary course. Second, unlike in *FAIR*, the Court would not have the benefit of the views of the court of appeals in this case.

3. Petitioners suggest that this case presents constitutional claims that are not presented in *FAIR*. Pet. 4-5. In particular, petitioners point to their claims that the Solomon Amendment violates "their constitutionally protected rights of academic freedom" and "the constitutionally protected right of private associations to disassociate themselves from" persons with whose conduct and views they disagree. *Id.* at 5. Contrary to petitioners' assumption, the *FAIR* plaintiffs raised those claims or similar claims in the district court and court of appeals. See 04-1152 Pet. App. at 15a-25a (court of appeals) (freedom of association); *id.* at 21a-22a n.13 (court of appeals) (academic freedom); *id.* at 139a-142a (district court opinion) (academic freedom). Whether or not this Court in *FAIR* addresses all the issues petitioners here might wish to raise, there is no reason to prematurely take this case out of the hands of the Second Circuit. To the contrary, the Court should defer review until the Second Circuit has had an opportunity to address all of the issues petitioners have raised, with the

benefit of this Court's decision in *FAIR* if it is rendered before the Second Circuit rules.

4. Petitioners also contend that "considerations of standing [and] ripeness are less likely to prevent this Court from reaching" the merits in this case than they are in *FAIR*. Pet. 4. But ripeness has never been at issue in *FAIR*, and the government is no longer contesting standing in *FAIR* either. See 04-1152 Pet. at 7 n.2. In this case, in contrast, it remains open to the government to renew its standing and ripeness arguments in the court of appeals, and if the present petition is granted, this Court may be called on to address those issues as well. Thus, there is no basis for petitioners' claim that this case presents fewer potential jurisdictional obstacles than does *FAIR*.

5. Finally, petitioners argue that the constitutional interests of the Nation's law schools demand that this Court resolve the constitutionality of the Solomon Amendment. Pet. 22-24. The Court, however, has already taken the steps needed to accomplish that goal by granting the petition for certiorari in *FAIR*. If petitioners wish to be heard on the constitutionality of the Solomon Amendment, they are free to participate in *FAIR* as amici curiae and present the Court with whatever constitutional arguments they think appropriate. There is no reason for the Court to take the additional step of granting petitioners' extraordinary request for review before judgment.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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